IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 433 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE J.M. PANCHAL
AND
HON'BLE MR.JUSTICE H.B. ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
JASHWANTSINH BABUBHAI PARMAR - Respondent

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Appearance :
MR KT DAVE, APP for Appellant.
NOTICE SERVED for Respondent.

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CORAM :HON'BLE MR.JUSTICE J.M.PANCHAL
& HON'BLE MR.JUSTICE H.B.ANTANI

Date : 01/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973 is directed against judgment dated March 8, 1996 rendered by the learned Additional

Sessions Judge, Kheda, in Special (NDPS) Case No.171 of 1992 by which the respondent is acquitted of the offences punishable under Sections 20(a) & 20(b) of the Narcotic Drugs & Psychotropic Substances Act, 1985 ("the Act" for short).

2. The facts emerging from the record of the case are as under:

Mr.P.R.Shah was then discharging duties as Police Sub Inspector, L.C.B., Anand. His staff received an information that the respondent was cultivating *ganja* in the field situated in the sim of Village Shili. Mr.Shah thereupon requisitioned services of two panchas and went to the field known as "*malsarwala field*". On reaching the field, he found that one person was in the field. Mr.Shah, therefore, interrogated the said person and on interrogation, he learnt that the name of the person, who was present in the field, was Jaswantsinh Babubhai Parmar (the respondent). The respondent further stated before Mr.Shah that survey number of the filed was 853. After initial interrogation, cultivation found in the field was inspected. Though it was claimed by the respondent that he had cultivated tobacco, a close search of the crop grown by Mr.Shah and his staff revealed that the respondent had cultivated *ganja,* which is a cannabis plant. Mr.Shah demanded pass or permit or licence from the respondent authorizing him to cultivate cannabis plants. The respondent could not produce any such permit or licence. Mr.Shah, therefore, uprooted cannabis plants. The weight of the cannabis plant was found to be 300 gms. Thereafter, samples were drawn and sealed. Mr.Shah

produced the respondent and the *muddamal* before the PSO of Khambholaj Police Station and also lodged his complaint. *Muddamal* was sent to Forensic Science Laboratory for analysis. The complaint of Mr.Shah was investigated by him. The report of the analysis indicated that the substance analyzed was cannabis sativa, i.e. g*anja plant.* On completion of investigation, the respondent was chargesheeted in the Court of learned Judicial Magistrate First Class, Umreth, for commission of offences punishable under Sections 20(a) and 20(b) of the Act and Sections 66(1)(b) and 65(e) of the Bombay Prohibition Act.

3. As the offences punishable under the Act are exclusively triable by a Special Judge, the case was committed to the Court of learned Special Judge, District Kheda, where it was numbered as Special (NDPS) Case No.171 of 1992. The learned Additional Sessions Judge, Kheda, to whom the case was made over for trial, framed necessary charge against the respondent at Exh.4. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Mustufabhai Rehmanbhai Vhora as P.W.-1 at Exh.7; (2) Mohmedbhai Rasulbhai Vhora as P.W.-2 at Exh.10; (3) Ravjibhai Nathubhai as P.W.-3 at Exh.11; (4) Raisingbhai Bhaijibhai Waghela as P.W.-4 at Exh.16; (5) Pradipkumar Rasiklal Shah as P.W.-5 at Exh.22; (6) Himatsinh Motisinh Solanki as P.W.-6 at Exh.29; and, (7) Kantibhai Premabhai Rathod as P.W.-7 at Exh.32, to prove its case against the respondent. The prosecution also produced documentary evidence such as panchnama indicating cultivation of *ganja* in Survey No.853, which was located in the sim of Village Shili at Exh.9; copy

of 7-12 extract of Survey No.854/1 at Exh.17; copy of 7-12 extract of Survey No.854/2 at Exh.18; Village Form No.8 indicating ownership of the respondent with another, of two survey numbers mentioned therein at Exh.19; copy of the report prepared by Mr.Shah indicating compliance of provisions of Section 42 of the Act at Exh.23; complaint lodged by Mr.Shah at Exh.24; intimation given by PI, L.C.B. Branch, to PSI, Khambholaj Police Station, to forward investigation papers at Exh.25; report of the Forensic Science Laboratory at Exh.27; extract from station diary maintained at Khambholaj Police Station at Exh.30; entry made regarding handing over of *muddamal* etc., to PSO, Khambholaj Police Station, at Exh.33, etc. in support of its case against the respondent.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the respondent the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the case of the respondent was that he had mortgaged the field in question and was not in occupation of the same. However, no defence evidence was adduced by him.

5. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the respondent was in possession of Survey No.854/2 and raised cultivation of *ganja* without permit or licence and had committed offence punishable under

Section 20(a) of the Act. However, according to the learned Judge, when Mr.Shah was about to search the field belonging to the respondent, he had not informed the respondent of his right to be searched in presence of a gazetted officer or a magistrate and, therefore, mandatory provisions of Section 50 of the Act were not complied with. In view of abovereferredto conclusions, the learned Judge has acquitted the respondent by judgment dated March 8, 1996, giving rise to instant appeal.

6. Mr.K.T.Dave, learned Additional Public Prosecutor appearing for the appellant, contended that the provisions of Section 50 of the Act were not applicable to the facts of the case at all as Mr.Shah had not searched person of the respondent, but had searched the field in which the respondent had cultivated cannabis plants and, therefore, the impugned judgment deserves to be set aside. It was argued that the learned Judge of the trial Court has recorded acquittal of the respondent only on the ground that mandatory provisions of Section 50 of the Act were not complied with and as all other findings are recorded in favour of the prosecution, instant appeal should be allowed and the respondent should be suitably punished for having committed offences punishable under Sections 20(a) and 20(b) of the Act. The learned counsel asserted that the judgment cited at the Bar by the learned Public Prosecutor before the trial Court to emphasis that the provisions of Section 50 of the Act were not applicable to the facts of instant case, is completely misread by the learned Judge and as the same principle, which was sought to be canvassed before the trial Court, is authoritatively laid down by the Supreme Court in

State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350, instant appeal should be allowed. The learned counsel of the State Government argued that the learned Judge of the trial Court has not only misconstrued the statutory provisions of the Act, but has also misread the evidence on record and, therefore, the appeal should be accepted.

7. Though duly served, the respondent has neither appeared in person nor through his lawyer.

8. This Court has heard Mr.K.T.Dave, learned Additional Public Prosecutor for the State. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. Having heard the learned Additional Public Prosecutor for the State, this Court is of the opinion that the learned Judge of the trial Court was not justified in invoking the provisions of Section 50 of the Act to the facts of instant case. When Mr.Shah had searched the field allegedly belonging to the respondent, he was not searching the body of the respondent. The Supreme Court in **State of H.P. vs. Pawan Kumar (supra)** has authoritatively laid down that when a bag, a briefcase, a suit case, a tin-box, a *thaila*, a *jhola*, a *gathari*, a holdall, a carton, etc. are searched, the provisions of Section 50 of the Act would not be applicable because in the process of search of those articles, the human body of the person carrying those article

is not searched. Admittedly, here what was searched was field allegedly belonging to the respondent. Under the circumstances, the learned Judge of the trial Court could not have acquitted the respondent on the basis that mandatory provisions of Section 50 of the Act were not complied with. Therefore, the finding recorded by the learned Judge that the provisions of Section 50 of the Act were not complied with and, hence, the respondent is entitled to acquittal, is liable to be set aside.

10. However, the record of the case shows that Mr.P.R.Shah, who had conducted search of the field allegedly belonging to the respondent, was PSI, L.C.B., Khambholaj. On receiving the information, he was obliged to forward the necessary report to his immediate official superior. Though one document is produced at Exh.23, it does not indicate compliance of provisions of Section 42(2) of the Act. On the contrary, Mr.Shah during the course of his cross-examination in paragraph 5 has, in terms, admitted that no report in writing was forwarded by him to his immediate official superior. A bare reading of the testimony of witness Mr.Shah, recorded at Exh.22, makes it evident that the mandatory provisions of Section 42(2) of the Act were not complied with by him.

11. Further, as per the complaint lodged by Mr.Shah, his staff had received an information that the respondent was cultivating cannabis plant in Survey No.853 situated in the sim of Village Shili. However, no satisfactory evidence is produced before the Court to establish that the respondent

was occupant/in possession of Survey No.853 situated in the sim of Village Shili. On the contrary, the Village Form 7/12 was produced relating to Survey No.854/1 wherein the name of occupant is mentioned to be Nathabhai Amarsing and it is further indicated therein that it is jointly owned by Dahyabhai Babubhai and Jashwanbhai Babubhai (the respondent). Similarly, 7/12 extract of Survey No.854/2 produced by the prosecution at Exh.18 also indicates that Nathabhai Amarsing was occupant and that it was jointly owned by Dahyabhai Babubhai and Jashwantbhai Babubhai (the respondent). Therefore, no evidence worth the name could be produced by the prosecution to establish that the respondent was in possession of Survey No.853 situated in the sim of Village Shili. What is relevant is to notice the contents of Village Form No.8 produced by the prosecution at Exh.19. Therein it is mentioned that Survey Nos.848/2, 833/1, 848/1, 854/1 and 854/2 are jointly owned by Dahyabhai Babubhai and Jaswantbhai Babubhai (the respondent). In the said Village Form, there is no mention of Survey No.853 relating to which, information was received by PSI Mr.Shah. It is relevant to notice that, initially, abovereferredto lands and other lands were jointly owned by father of the respondent and another, and on partition, some fields had come to the share of father of the respondent and one of the fields belonging to the father of the respondent was known as "*malsarwala field".* No reliable evidence is adduced by the prosecution to establish that Survey No.853 was occupied by the respondent or that it had come to the share of father of the respondent and was known as "*malsarwala field".* Under the circumstances, this Court is of the opinion that it is not firmly established by the prosecution that the respondent was in possession of Survey No.853 situated in the sim of Village

Shili, and he had cultivated cannabis plants therein. Thus, commission of offences punishable under Sections 20(a) and 20(b) of the Act by the respondent is not proved and, therefore, his acquittal will have to be upheld on the other grounds.

For the foregoing reasons, the appeal fails and is dismissed. *Muddamal* be disposed of in terms of directions given by the learned Judge of the trial Court in the judgment impugned in the appeal.

(J.M.PANCHAL, J.)

(H.B.ANTANI, J.)

Rajendra